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PP

v.

DATO' SUHAILI ABDUL RAHMAN

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF FCJ
SULONG MATJERAIE JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEAL NO: S-09-207-2010]

C

17 OCTOBER 2011

BANKRUPTCY: *Fraudulent debtor - Punishment - Guarantor for loan facility while being an undischarged bankrupt - Bankruptcy order - Annulment of - Whether annulment of bankruptcy order puts respondent in position as if there was no adjudication - Effect of - Whether respondent informed bank that he was an undischarged bankrupt before being a guarantor - Bankruptcy Act 1967, s. 109(1)(m)(ii)*

D

BANKRUPTCY: *Receiving and adjudication order - Rescission and annulment - Guarantor for loan facility while being an undischarged bankrupt - Effect of - Whether annulment of bankruptcy order puts respondent in position as if there was no adjudication - Whether annulment of bankruptcy order had effect of wiping out bankruptcy altogether - Whether respondent informed bank that he was an undischarged bankrupt before being a guarantor - Bankruptcy Act 1967, s. 109(1)(m)(ii)*

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This was an appeal by the public prosecutor against the decision of the High Court in allowing the respondent's appeal against his conviction and sentence by the Sessions Court under s. 109(1)(m)(ii) of the Bankruptcy Act 1967 ('the Act'). On 19 February 1993, the receiving order and adjudication order were made against the respondent wherein he was subsequently adjudged a bankrupt. About four years later, the respondent succeeded to rescind and annul the said bankruptcy order against him. However, before the receiving order and adjudication order were rescinded and annulled, the respondent stood as a guarantor for a company, which belonged to his wife, in order to secure a loan from Maybank ('the said bank'). It was the prosecution's case that the act of the respondent in being a guarantor without disclosing to the said bank that he was a bankrupt had breached

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s. 109(1)(m)(ii) of the Act. The respondent relied on the case of *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* ('*Sardar*') and contended that with the annulment of the bankruptcy order against him, he could not be guilty or convicted of the offence under s. 109(1)(m)(ii) of the Act. The issue that arose for consideration herein was whether the annulment of the bankruptcy order against the respondent had the effect of wiping out the bankruptcy altogether and to put the respondent in the same position as if there had been no adjudication.

Held (allowing the appeal; setting aside High Court order; affirming conviction and sentence of Sessions Court)
Per Raus Sharif FCJ delivering the judgment of the court:

(1) The annulment of the bankruptcy order did not affect the criminal proceedings against the respondent. The case of *Sardar* had no application to the present case as it was decided on the effect of an annulment in a civil case and did not specifically decide on whether the retrospective effect of the annulment would also apply to criminal proceedings. (para 13)

(2) Section 109(1)(m)(ii) of the Act provides that it is an offence for an undischarged bankrupt to engage in any trade or to enter into any contract. While being an undischarged bankrupt, the respondent became a guarantor for a loan facility. Furthermore, the law required him to inform the bank but had failed to do so. Hence, the respondent had breached the penal provision of s. 109(1)(m)(ii) of the Act (*DPP v. Ashley*; foll). (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan pihak pendakwaraya terhadap keputusan Mahkamah Tinggi dalam membenarkan rayuan responden terhadap sabitan dan hukumannya oleh Mahkamah Sesyen di bawah s. 109(1)(m)(ii) Akta Kebankrapan 1967 ('Akta'). Pada 19 Februari 1993, perintah penerimaan dan perintah penghakiman telah dimasuki terhadap responden di mana beliau telah diisytiharkan sebagai bankrap. Lebih kurang empat tahun kemudian, responden telah berjaya untuk membatalkan perintah kebankrapan tersebut terhadapnya. Walau bagaimanapun, sebelum perintah penerimaan dan perintah penghakiman dibatalkan, responden telah menjadi penjamin bagi sebuah syarikat, yang dimiliki oleh isterinya, untuk mendapatkan pinjaman daripada

A Maybank ('bank tersebut'). Adalah kes pihak pendakwaraya bahawa kelakuan responden dalam menjadi seorang penjamin tanpa memaklumkan bank tersebut bahawa beliau adalah seorang bankrap, telah memungkiri s. 109(1)(m)(ii) Akta. Responden telah bergantung kepada kes *Sardar Mohd Roshan Khan v. Perwira Affin*
B *Bank Bhd* ('*Sardar*') dan berhujah bahawa dengan pembatalan perintah kebankrapan terhadapnya, beliau tidak boleh didapati bersalah atau disabit dengan kesalahan di bawah s. 109(1)(m)(ii) Akta. Isu yang dibangkitkan di sini untuk pertimbangan adalah sama ada pembatalan perintah kebankrapan terhadap responden
C mempunyai kesan menghapuskan kebankrapan tersebut sama sekali dan untuk meletakkan responden dalam keadaan yang sama jika tiada penghakiman.

D **Keputusan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi; mengesahkan sabitan dan hukuman Mahkamah Sesyen)**

Oleh Raus Sharif HMP menyampaikan penghakiman mahkamah:

E **(1)** Pembatalan perintah kebankrapan tersebut tidak menjejaskan prosiding jenayah terhadap responden. Kes *Sardar* tidak boleh digunapakai dalam kes ini dimana ianya telah diputuskan terhadap kesan sesuatu pembatalan dalam kes sivil dan tidak memutuskan dengan spesifik sama ada kesan retrospektif
F pembatalan tersebut juga boleh digunapakai dalam prosiding jenayah.

(2) Seksyen 109(1)(m)(ii) Akta memperuntukan bahawa ianya adalah satu kesalahan bagi seseorang bankrap tidak dilepaskan untuk melibatkan dirinya dalam sebarang perdagangan atau
G untuk memasuki sebarang kontrak. Walaupun masih lagi seorang bankrap tidak dilepaskan, responden telah menjadi seorang penjamin bagi kemudahan pinjaman. Tambahan lagi, undang-undang memerlukan responden untuk memaklumkan bank tetapi beliau telah gagal berbuat demikian. Oleh itu,
H responden telah memungkiri peruntukan penal bagi s. 109(1)(m)(ii) Akta (*DPP v. Ashley*; diikuti).

Case(s) referred to:

DPP v. Ashley [1955] Crim LR 565 ***(foll)***

I *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC* ***(not foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 109(1)(m)(ii)

Bankruptcy Act 1914 [UK], s. 155(a)
Companies Act 1948 [UK], s. 187

For the appellant - Tuan Ahmad Bachek; AG's Chambers
For the respondent - Rakhbir Singh; M/s Rakhbir Singh & Co

[Appeal from High Court, Kota Kinabalu; Criminal Appeal No: K42-25-2010]

Reported by Kumitha Abdul Majid

JUDGMENT

Raus Sharif FCJ:

Introduction

[1] This is an appeal by the public prosecutor against the decision of the High Court in Sabah which had on 27 September 2010 decided in favour of the respondent. The High Court had allowed the respondent's appeal against conviction and sentence by the Sessions Court under s. 109(1)(m)(ii) of the Bankruptcy Act 1967.

[2] We heard the appeal on 20 June 2011. We allowed the appeal. We had indicated that we will be giving our reasons for allowing the appeal. We now give our reasons for the same.

Background Facts

[3] The facts leading to this appeal are these. The respondent was originally charged as follows:

> 1st Charge
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> Bahawa kamu di antara 3 April 1996 hingga 11 April 1996, di Pejabat Malayan Banking Berhad, cawangan Kota Kinabalu, dalam daerah Kota Kinabalu, dalam negeri Sabah, telah menipu Ismail bin Jantan, Pengurus Malayan Banking Berhad cawangan Kota Kinabalu, dengan memperdayakan beliau untuk mempercayai bahawa kamu adalah Ahmad Suhaily bin Abdul Rahman, nombor kad pengenalan H 0552181 yang akan bertindak sebagai penjamin di dalam borang 'Maybank Application for Accomodation Face Sheet' bagi tujuan pinjaman Maxihome Term Loan sebanyak

RM110,000 dan overdraft sebanyak RM50,000 untuk membeli unit No. 3/R2/32, Tingkat 2, Api-Api Centre, Fasa 1A, Kota Kinabalu, dan oleh itu kamu telah dengan curangnya mendorong Ismail bin Jantan untuk meluluskan pinjaman kepada syarikat kepunyaan kamu iaitu syarikat Saraequity Sdn Bhd (354615-A) yang mana beliau tidak akan meluluskan pinjaman tersebut sekiranya mengetahui nama dan nombor kad pengenalan tersebut adalah tidak benar, dan dengan itu kamu telah melalukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan.

2nd Charge

Bahawa kamu di antara 3 Ogos 1995, di Pejabat Jaksa Pendamai Haji Mohd Naser Haji Mohd Noor, dalam daerah Kota Kinabalu, dalam negeri Sabah, di dalam Akuan Berkanun (Borang 48A) Akta Syarikat 1965 yang dibuat oleh kamu atas nama Ahmad Suhaily bin Abdul Rahman, bernombor kad pengenalan H 0552181 (B) yang boleh diterima di sisi undang-undang sebagai keterangan mengenai sesuatu fakta, telah membuat kenyataan palsu di dalam Akuan Berkanun di hadapan Haji Mohd Naser Haji Mohd Noor iaitu:

I Ahmad Suhaily Abdul Rahman I/C No. H 0552181 (B) … do solemnly and sincerely declare that:

Yang mana kamu ketahui sebagai palsu berkenaan perkara yang material kepada tujuan Akuan Berkanun itu dibuat bagi pendaftaran Syarikat Saraequity Sdn Bhd (354615-A) dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 199 Kanun Keseksaan dan boleh dihukum di bawah seksyen 193 Akta yang sama.

[4] On 9 March 2010, the public prosecutor tendered an alternative charge under s. 109(1)(m)(ii) of the Bankruptcy Act 1967 which reads as follows:

Bahawa kamu pada 3 April 1996 di Malayan Banking Berhad Cawangan Kota Kinabalu, 9 Beach Street, Kota Kinabalu dalam negeri Sabah telah menjadi penjamin di dalam borang permohonan "Application for Accomodation Face Sheet" bagi tujuan pinjaman untuk syarikat Saraequity Sdn Bhd bagi kemudahan pinjaman sebanyak RM110,000 dan kemudahan overdraft sebanyak RM50,000 untuk membeli unit No. 3/R2/32, Tingkat 2, Api-Api Centre, Fasa 1A, Kota Kinabalu tanpa memaklumkan kepada pihak Malayan Banking Berhad Cawangan Kota Kinabalu bahawa kamu adalah seorang yang muflis dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 109(1)(m)(ii) Akta Kebankrapan 1967 yang boleh dihukum di bawah seksyen yang sama.

[5] The respondent pleaded guilty to the alternative charge. He was sentenced to a fine of RM10,000 in default one month imprisonment. The respondent was thereafter acquitted and discharged of the 1st charge and 2nd charge as the prosecution chose not to offer any further evidence.

[6] On 13 March 2010, the respondent filed a Notice of Appeal against the conviction and sentence on the alternative charge. He had also on 16 August 2010 filed a Notice of Motion for an order that the decision of the Sessions Court judge be revised. He sought for the conviction and sentence to be set aside.

[7] The facts leading to and culminating in the prosecution of the respondent are these. A default judgment was entered against the respondent on 18 May 1987 in the High Court, at Kota Kinabalu, in Suit No. K 1229 of 1986. The respondent was the 2nd defendant who was the guarantor to the loan facility granted to the 1st defendant a company belonging to his wife. Based on the default judgment, Bumiputra Finance Limited (plaintiff in Suit No. K. 1229 of 1998) filed a Bankruptcy Notice dated 31 October 1991 against the respondent.

[8] The bankruptcy notice was served personally on the respondent on 18 December 1991 and the affidavit of service was filed accordingly. Subsequently, the creditor's petition dated 25 March 1997 was presented and fixed for hearing. On 19 February 1993, the receiving order and adjudication order (RO & AO) were made against the respondent. In effect the respondent was made a bankrupt.

[9] About four years later, ie, on 19 February 1997, the respondent filed a summon in chambers under r. 18 Bankruptcy Rules 1969 for the RO & AO dated 19 February 1993 be rescinded and annulled or be set aside. On 9 May 1997, the respondent succeeded in rescinding and annulling the bankruptcy order.

[10] However, before the RO & AO was rescinded and annulled, the respondent had on 19 February stood as a guarantor for Saraequity Sdn Bhd, a company belonging to his wife in securing a loan of RM110,000 and overdraft facilities of RM50,000 from Maybank. Thus, it was the prosecution's case that the act of the respondent on 3 April 1996 in being a guarantor for a loan for

his wife's company without disclosing that he was a bankrupt has breached s. 109(1)(m)(ii) of the Bankruptcy Act 1967. The section reads as follows:

> 109. Punishment of fraudulent debtors
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> (1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:
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> (m) if being an undischarged bankrupt:
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> (ii) either alone or jointly with any other person he engages in any trade or business or enters into any contract in furtherance of any trade or business, unless he proves that before engaging in the trade or business or before entering into the contract he informed the person with whom he engages in the trade or business or with whom he entered into the contract that he was an undischarged bankrupt;

Decision

[11] The main issue before us as well as the High Court was whether the annulment of the bankruptcy order against the respondent has the effect of wiping out the bankruptcy altogether and put the respondent in the same position as if there had been no adjudication. It was the respondent's case that with the annulment of the bankruptcy order, he could not be guilty or be convicted of the offence under s. 109(1)(m)(ii) of the Bankruptcy Act 1967. The respondent relied on the Federal Court case of *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661 (*Sardar*). The prosecution's stand is that *Sardar*'s case has no application in criminal proceedings. It was submitted that in criminal proceedings, the English case of *DPP v. Ashley* [1955] Crim LR 565 is a persuasive authority to follow.

[12] The learned High Court judge agreed with the proposition advanced by the respondent and concluded by stating:

> It would clearly be wrong to prosecute and convict the accused for an alleged bankrupt offence, when he ought not to have been adjudged bankrupt in the first plea, after his bankrupt had been annulled. It would have been different if the accused had been

charged, for example for rape or manslaughter, for the alleged offences have no connection to the alleged bankruptcy. In that situation, the annulment should not affect his criminal liability for the rape or manslaughter. For the above reason given, I decline to follow the decision of *DPP v. Ashley*.

[13] With utmost respect, we are unable to agree with the decision of the learned High Court judge. We are of the view that the annulment of the bankruptcy order did not affect the criminal proceedings against the respondent. *Sardar*'s case has no application to the present case as it was decided on the effect of an annulment in a civil case. The Federal Court there did not specifically decide on whether the retrospective effect of the annulment would also apply to criminal proceedings.

[14] In respect of criminal proceedings, we are inclined to follow *DPP v. Ashley (supra)*. In that case, the accused was charged with two bankruptcy offences, namely, with obtaining credit for more than £10 while being an undischarged bankrupt contrary to s. 155(a) Bankruptcy Act 1914 of United Kingdom and with managing a business whilst being an undischarged bankrupt without the permission from the court contrary to s. 187 of the Companies Act 1948 of the United Kingdom. Before proceedings were commenced against the accused, the bankruptcy was annulled and as such his counsel argued that both charges were bad in law. It was held that the charges were good in law as the annulment was no defence to an indictment for bankruptcy offences.

[15] We apply the same principle in the present case. Section 109(1)(m)(ii) of the Bankruptcy Act 1967 provides that it is an offence for an undischarged bankrupt to engage in any trade or to enter into any contract. In our case, the respondent was declared a bankrupt on 19 February 1993. On 3 April 1996, while he was an undischarged bankrupt, he became a guarantor for a loan facility. The law requires him to inform the bank but he failed to do so. The respondent had breached the penal provision of s. 109(1)(m)(ii) of the Bankruptcy Act 1967.

[16] For the above said reasons, we allowed the appeal. The order of the High Court is therefore set aside. We affirmed the conviction and sentence of the Sessions Court judge.

A **[17]** As to the respondent's notice of motion, for an order that the decision of the Sessions Court be set aside, we find that the application is devoid of any merit. In the instant case, the respondent pleaded guilty to the charge and admitted the facts presented by the prosecution. He was represented by counsel and
B as such we are not persuaded by his claim that he did not understand the nature and consequences of his plea. The application *via* the notice of motion is also dismissed.

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